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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W.E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment is violated by a *per se* rule permanently denying the press and public access to unfiled discovery materials in civil cases, where no protective order based upon good cause has been entered.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceeding before the Florida Supreme Court:

Petitioners

The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder, Inc.

Sentinel Communications Company

Florida Publishing Company

Respondents

The Honorable William Carter Gridley

Paula Hawkins

W.E. Hawkins

Cowles Broadcasting, Inc.

Channel Two Television Company of Florida

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner The Miami Herald Publishing Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in the above proceeding.

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of Florida in *Miami Herald Publishing Co. v. Gridley* (*"Gridley"*) appears at 510 So.2d 884 (Fla. 1987), and is reprinted in the appendix, A. 2-3. The opinion of the Fifth District Court of Appeal in *Sentinel Communications Co. v. Gridley* appears at 496 So.2d 259 (Fla. 5th Dist. Ct. App. 1986), and is reprinted in the appendix, A. 5-6. The order entered by the Circuit Court of the Ninth Judicial Circuit in *Hawkins v. Cowles Broadcasting, Inc.* has not been reported. It is reprinted in the appendix, A. 7-8.

JURISDICTION

The opinion of the Supreme Court of Florida in *Gridley* was entered on July 2, 1987. A Motion for Rehearing was timely filed on July 17, 1987, which motion was denied by the Supreme Court of Florida on September 3, 1987. On November 21, 1987, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including January 1, 1988. Subsequently, on December 24, 1987, Justice Stevens ordered that the time for filing a petition for writ of certiorari be extended to and including January 16, 1988. This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and rules involved are:

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 1.280(c), Florida Rules of Civil Procedure:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are

just, order that any party or person provide or permit discovery. The provisions of Rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 1.310(f), Florida Rules of Civil Procedure:

(3) A copy of a deposition may be filed only:

(A) By a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court. Prompt notice of the filing of the deposition shall be given to all parties unless notice is waived. A party filing the deposition shall furnish a copy of the deposition or the part being filed to other parties unless the party already has a copy.

(B) If the court determines that a deposition previously taken is necessary for the decision of a matter pending before the court, the court may order that a copy be filed by any party at the initial cost of the party.

Rule 1.350(d), Florida Rules of Civil Procedure:

(d) Filing of Documents. Unless required by the court, a party shall not file any of the documents or things produced with the response. Documents or things may be filed when they should be considered by the court in determining a matter pending before the court.

STATEMENT OF THE CASE

Introduction

Approximately 92% of all civil cases litigated in Florida's courts conclude without having proceeded to

public trial.[1] Consequently, Florida's system of civil justice, like the federal system on which it is modeled, is primarily a pretrial process, and press access to that process is essential for the public to understand and monitor its workings.

Since few Florida civil cases proceed to trial, journalists for *The Miami Herald* have come to depend heavily on the sworn testimony and evidence adduced during the pretrial process to report fully and accurately on civil litigation of legitimate public concern.[2] This reliance on deposition testimony proceeded for years largely

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1. According to figures provided by the Florida Supreme Court Summary Reporting Service and compiled by the State Court Administrative Office, in recent years, 8% or fewer of all civil cases filed in the circuit courts of Florida culminated in trial. Thus, in 1986, of 300,181 cases disposed of, only 24,840 culminated in trial. Likewise, in the first half of 1987, of 154,388 cases, only 9,796 (6%) were disposed of by trial. Some additional percentage, not recorded by the state, presumably concluding *during* trial.

2. Prior to *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985), *aff'd*, 504 So.2d 378 1987), Florida trial judges repeatedly had held that members of the press enjoyed a qualified right to both attend depositions taken in civil cases and inspect transcripts. *See, e.g., Withlacoochee v. Seminole Electric*, 1 Fla. Supp. 2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); *Cazarez v. Church of Scientology*, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); *Johnson v. Broward County*, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981). Criminal depositions were likewise presumed open in Florida prior to *Burk*. *Florida v. O'Dowd*, 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983) (Mize, J.); *Florida v. Tolmie*, 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J.); *Florida v. Reid*, 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); *Florida v. Sanchez*, 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); *Florida v. Hodges*, 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); *Florida v. Alford*, 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); *Florida v. Diggs*, 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); *Florida v. Bundy*, 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.).

without comment or moment[3] because transcripts were routinely filed in the public court file pursuant to both practice and the rules. It was not until Florida's adoption of new "housekeeping" rules, designed to "relieve the document storage burden" which all courts began to experience in the last decade, that parties no longer filed discovery responses and deposition transcripts as a matter of course.[4]

While the filing rules were never intended to diminish substantive public access rights, they have had just this consequence in Florida. In fact, as the case at bar amply demonstrates, these rules have provided the opportunity for civil litigants to control and limit public knowledge of particular litigation and of the judicial process, even when that litigation involves a public official, is a matter of fundamental public concern, and no sound basis for such limitation is even asserted.

United States Senator Paula Hawkins' Personal Injury Lawsuit and Her Bid for Reelection

On January 5, 1982, Paula Hawkins ("Hawkins" or the "Senator"), then a United States Senator, injured her

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3. Throughout this period, only three cases involving deposition access reached the Florida appellate courts, and each affirmed the qualified right to monitor the deposition process. *See Ocala Star Banner Corp. v. Sturgis*, 388 So.2d 1367 (Fla. 5th DCA 1980); *Sentinel Star Co. v. Booth*, 372 So.2d 100(Fla. 2d DCA 1979); *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979).

4. *See In re Florida Rules of Civil Procedure*, 403 So.2d 926, 930 (Fla. 1981) (adopting Rule 1.310(f) to restrict the filing requirement "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system"); *see also* Rule 5(d), Federal Rules of Civil Procedure, Notes of Advisory Committee, 1980 Amendment ("large volume of discovery filings presents serious problems of storage . . . but such materials are sometimes of interest to those who may have no access to them except by a requirement of filing").

back in an accident at WESH Channel Two in Orlando, Florida. Approximately four years later, Hawkins and her husband filed a lawsuit against the television station claiming that the accident was due to the station's negligence. The Senator's complaint, itself a public judicial record, alleged the accident caused her to suffer an injury which became a physical handicap impairing her ability to work:

> Plaintiff Paula Hawkins was injured in and about her body and extremities, suffered pain thereupon, incurred medical expenses in the treatment of said injuries, *suffered physical handicap and her working ability was impaired; said injuries are either permanent or continuing in nature and plaintiff will suffer such loss and impairment in the future.*

A. 12 (emphasis added). In order to test the validity of the Senator's public allegations, the defendants commenced discovery. Depositions were taken and interrogatories propounded and answered. The state of the Senator's health was one of the central issues in the personal injury lawsuit.

At the same time Hawkins was prosecuting this civil action for impairment of "her working ability," she continued in her role as United States Senator and actively sought reelection. As a result of the allegations raised by the Senator in the pending lawsuit, her health also became a major issue in the campaign. Throughout, Hawkins maintained that she was physically fit to hold office and that her ability to fulfill her duties as a United States Senator was not in any way impaired. She denied repeated press requests for any information regarding her condition or injury.

The Motion for Access

The health and physical fitness of a candidate for high public office is always a matter of legitimate public concern. In the Senator's case, as Election Day neared, the clear conflict between her professed legal position regarding her health and her campaign promises was cause for even greater concern. Accordingly, the press (including *The Miami Herald*) moved for access to those deposition transcripts and interrogatory answers in the Senator's lawsuit (the "Records") which directly related to her fitness to serve a second term in the United States Senate. A. 9-20. Timeliness of access, although always important in news reporting, was particularly urgent since the fall election campaign was nearly over.

In the motion requesting access, the press explained that access to the Records would provide information highly relevant to the public's assessment of the Senator's fitness to hold office. Had the Records revealed the Senator to be seriously incapacitated, that information would surely bear on the electorate's judgment of her fitness to hold office.

In addition, since the Senator had steadfastly claimed in her campaign that she was healthy, any documents indicating she was impaired would have reflected on her character for truthfulness and fitness to hold office. If, in contrast, the Records had shown the Senator was healthy, but had nonetheless filed a lawsuit claiming that she was not, access to the Records would also bear directly on her character for truthfulness. Thus, whatever the Records might have revealed, they were clearly of great public interest on the eve of the general election.

The press advanced three legal grounds for public access to the Records. The Florida and federal rules of procedure, the common law, and the First Amendment all made the Records presumptively open to the public. Thus, only a showing of "good cause" or the most compelling reasons could justify limiting access to the Records. Since Hawkins could demonstrate no compelling reason or cause for closure, particularly given her status as a candidate for reelection to the United States Senate, the Records should be open to the public.

Hawkins' response was twofold. First, she argued that the press had no standing to intervene in her lawsuit simply to seek access. Second, she argued that the public had no right to inspect the Records in her "private" personal injury lawsuit. Relying primarily on this Court's decision in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), and *Sentinel Communications Co. v. Smith,* 493 So.2d 1048 (Fla. 5th Dist. Ct. App. 1986), Hawkins contended that the public enjoyed no common law or constitutional right of access to the Records and that her position as a candidate and public official did not alter the legal status of the Records. Claiming only that the release of the Records would constitute an invasion of her privacy, Hawkins made no attempt to demonstrate why the Records should not be released. In the alternative, Hawkins requested that she be given the opportunity to seek a protective order based upon "good cause" to limit access to the Records.

After hearing argument, the trial court held that the press had standing to intervene but denied the motion for access, stating:

> This trial court considers itself bound by the appellate decision of *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985) which denied such access in an extensive and thorough en banc opinion and also certified this very issue to the Florida Supreme Court as being a question of great public importance. This issue is presently pending before the Florida Supreme Court.

A. 8.[5]

The Emergency Appeal

The press immediately sought emergency review of the order of the trial court. The following day, without hearing oral argument, the Fifth District Court of Appeal summarily affirmed the order of the trial court and denied the petition filed by the press:

> Based upon the *Palm Beach* case and the prior opinion of this court in *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980), we deny the petition. *See also Seattle Times Corp. v. Rhinehart,* 467 U.S. 20 (1984).

A. 6. In addition, the Fifth District certified the following question to the Florida Supreme Court as a matter of great public importance:

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5. In *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985), *aff'd,* 504 So.2d 378 (Fla. 1987), the Fourth District Court of Appeal, sitting *en banc,* held 5-4 that the public and press enjoyed no right of access to criminal depositions. *Burk* was pending in the Florida Supreme Court on certified question when the trial court and district court of appeal rendered their decisions in this case. The lower *Gridley* courts simply ignored the conflicting 7-2 *en banc* decision of Florida's Third District Court of Appeal although it too was then pending before the Florida Supreme Court on certified question. *Estrada v. Snyder,* Case No. 86-767 (Fla. 3d Dist. Ct. App. 1986), *jurisdiction declined sub nom. Miami Herald Publishing Co. v. Estrada,* No. 68,625 (Fla. 1987).

Are unfiled discovery materials in a civil case accessible to the public and hence to the press?

A. 6.

The Decision of the Florida Supreme Court

The Florida Supreme Court, like the Fifth District Court of Appeal, summarily affirmed the order of the trial court. Relying on its recent decision in *Palm Beach Newspapers, Inc. v. Burk,* in which it held the public enjoyed no right of access to unfiled deposition transcripts in criminal cases, and on this Court's decision in *Seattle Times Co. v. Rhinehart,* the court stated:

> We recognize, of course, that our decision in *Burk* dealt with this issue in the context of criminal proceedings. However, the rationale employed in *Burk* leads us to the same conclusion here concerning the right of access in civil proceedings. We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

A. 3. The court extended the bright line rule announced for criminal cases in *Burk* to civil proceedings and held that the public could be denied access to unfiled discovery materials irrespective of whether any cause, let alone "good cause," existed for the denial of access. *Id.* Thus, as a consequence of an interpretation of a decision of this Court, crucial information concerning Florida's civil justice system is now routinely withdrawn from public scrutiny without any party having to make the slightest showing of the propriety of such secrecy.

REASONS FOR GRANTING THE WRIT

I.

Three years ago, in *Seattle Times Co. v. Rhinehart,* this Court first addressed the relationship between First Amendment rights and court rules authorizing protective orders restricting *civil litigants'* dissemination of information obtained solely through the use of judicial discovery procedures. The decision wrought a careful balancing of the state's interest in preventing discovery abuses and facilitating the efficient litigation of civil disputes on one hand, and the free speech interests of litigants on the other.

The Court was careful to note that the protective order under review had been entered for "good cause," in accordance with the state rules of procedure. The plaintiff Aquarian Foundation had made a strong evidentiary showing that the protective order should be entered to preserve the anonymity, and thereby the important privacy and First Amendment rights, of its members and contributors. Filed affidavits showed that the unpopularity of the Aquarian sect had subjected known members to vandalism and retaliation for their beliefs. The trial court permitted discovery into these matters, but found "good cause" to limit the defendant's right to disclose this highly protected information obtained solely through the judicial process. This Court concluded that court rules providing for such protective orders upon a showing of "good cause" do not violate the First Amendment because they serve a substantial governmental interest unrelated to the suppression of speech and are appropriately tailored to protect that interest.

In the years since *Seattle Times*, the state and lower federal courts have attempted to apply its teachings in a variety of contexts, many of which are far removed from the narrow case of gratuitous disclosure of highly protected confidential information obtained by a civil litigant through court-ordered discovery. The cases very frequently involve the *public's* right to monitor civil litigation and understand our system of civil and criminal justice rather than a *party's* self-interested desire to disseminate irrelevant information obtained through discovery.

More technical distinctions are also found in the cases. Access claims may involve either filed or unfiled materials, and the access right may be asserted either post-judgment or pre-judgment. *See, e.g., In re Reporters' Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (no First Amendment right of access *prejudgment* to civil discovery documents filed with the court). The grounds recognized for the qualified access right have included the common law, court rules, state constitutional provisions, and the First Amendment.

Efforts to apply *Seattle Times* to these cases have been problematic since the case did not involve a public access claim. *See Reporters' Committee*, 773 F.2d at 1331 (*Seattle Times* is "more remote in that it did not invoke a claim by the public to *access*, but rather a claim by one of the parties to *disseminate* information acquired in the course of pretrial discovery") (Scalia, J.). The materials which were the subject of the protective order in *Seattle Times* were not filed with the court, and the right to disseminate them at will was restricted prior to entry of judgment.

The Florida Supreme Court's opinion is the most far-reaching limitation of the public's First Amendment right

of access to be based on *Seattle Times*. The Florida Court explicitly relied on its recent holding in *Palm Beach Newspapers, Inc. v. Burk*, in which the court held that the public enjoyed no right of access to unfiled deposition transcripts in *criminal* cases. In extending its *Burk* holding to the *civil* case at bar, the court stated:

> We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

A. 3. And, in *Burk*, the Florida court squarely held that its "conclusion that the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court finds support in *Seattle Times Co. v. Rhinehart*." 504 So.2d at 382 (citation omitted). Relying on *Seattle Times* to "[furnish] guidance," *id.*, the Florida Supreme Court in *Burk* and now *Gridley* has held that the press and public have absolutely no right of access to unfiled deposition transcripts, irrespective of whether "good cause" for closure is alleged (much less shown), whether any party objects to the denial of public access, or even whether judgment has been entered in the case. In short, the Florida court expressly attributed its expansive holding to the opinion of this Court in *Seattle Times*.

The crux of the *Burk* opinion, which provided the basis for the decision below, is the Florida court's assertion that as a *party litigant*, the Seattle Times was allowed discovery into the Aquarian Foundation's confidential information, but that "as a *newspaper*, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process." 504 So.2d at 382.

The flaws in this reading of *Seattle Times* are apparent. This Court's opinion nowhere states or implies that the press and public have no right to monitor the civil discovery process, and it nowhere holds or suggests that the Seattle Times' rights were solely those of a litigant. The order affirmed in *Seattle Times,* by its express terms, *did not limit public access to information relevant to litigation of the case.* The Court's careful balancing of litigants' interests has been converted by the Florida court into a *per se* rule of closure which finds no support in the actual language of the opinion, and is clearly contrary to its rationale. The *per se Burk/Gridley* closure rule, unlimited in scope or duration, serves no interest unrelated to the suppression of speech and is not narrowly drawn to serve a substantial governmental interest.

If the *Burk/Gridley* rule were the isolated decision of a single state court, guidance from the Court on this issue would be of "great public importance" only to the people of Florida. However, the Florida rule has been explicitly followed by the highest state courts of both Michigan and Arizona. *Booth Newspapers, Inc. v. Midland Circuit Judge,* 145 Mich.App. 396, 377 N.W.2d 868 (Mich. Ct. App. 1985), *leave to appeal denied,* 425 Mich. 854 (Mich. 1986), *cert. denied,* 107 S.Ct. 877 (1987) (no standing); *Lewis R. Pyle Memorial Hospital v. Superior Court,* 149 Ariz. 193, 717 P.2d 872, 876 (Ariz. 1986) (citing *Burk*). And the position of these courts is analogous to that of the Tenth Circuit Court of Appeals which has held the press has no standing to seek access to unfiled civil discovery materials. *Oklahoma Hospital Association v. Oklahoma Publishing Co.,* 748 F.2d 1421 (10th Cir. 1984), *cert. denied,* 473 U.S. 905 (1985).

These decisions, however, conflict with opinions of many other important appellate tribunals. At least seven United States Courts of Appeals have construed *Seattle Times* to hold that third parties do enjoy a qualified access right to discovery materials, a right which may be overcome only by a showing of "good cause." Some of these cases involve the public's right to monitor some of the most important "public law" cases of this era. *Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987) (holding that First Amendment associational rights constitute "good cause" to seal deposition testimony); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (requiring "good cause" to maintain seal on civil discovery documents designated "confidential" pursuant to blanket protective order in Vietnam veterans' suit for injuries caused by "Agent Orange" chemicals); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) (requiring "good cause" to prevent press access to unfiled discovery documents in suit concerning massive fraud by government securities broker); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (requiring "good cause" to seal civil discovery documents submitted to the court in support of motions in toxic waste case); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (requiring "good cause" to seal non-confidential civil discovery documents in products liability case against tobacco companies); *Worrell Newspapers v. Westhafer*, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984) (reciting that *Seattle Times* permits the entry of a protective order for "good cause" shown in the context of pretrial civil discovery); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for determination of whether the continua-

tion post-judgment of a protective order sealing deposition transcripts is supported by "good cause"); *see also United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd*, 776 F.2d 1104 (3d Cir. 1985) (requiring "good cause" to restrict public access to a bill of particulars deemed to be criminal discovery); *State v. Cianci*, 496 A.2d 139, 144-45 (R.I. 1985) (recognizing a First Amendment right of access to discovery materials produced in a state criminal prosecution). *See generally*, D. Paul, R. Ovelmen, L. Besvinick and F. Burt, "Access," in 3 *Communications Law 1987*, 224-26, 285-88 (PLI 1987).

In fact, journalists in Florida face this conflict squarely every day in trying to cover judicial proceedings in the state and federal courts. As a consequence of the decisions of the Eleventh Circuit in *Alexander Grant* and the Florida Supreme Court in *Burk* and in the case at bar, the press enjoys a qualified right of access to discovery materials produced in *federal* court, but no similar right in *state* civil or criminal actions.

This Court can provide critically needed guidance on the application of *Seattle Times* to third party access claims and in so doing resolve the conflicts among the many cases addressing the public's right to monitor the discovery process.

II.

In a series of decisions culminating in *Press-Enterprise II*,[6] this Court has developed the contours of a qual-

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6. *Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*"Press-Enterprise I"*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979).

ified First Amendment right of access to criminal prosecutions. The Court has never squarely decided whether the First Amendment access right applies to civil trials or other phases of the civil justice process. Yet the Court's access decisions imply that the public also enjoys a qualified right of access to civil trials, pretrial proceedings and documents. Several Justices have suggested as much in *dicta*.[7] This case presents a compelling opportunity to address this issue and provide much needed guidance to the bench, bar, and press. The Court should endorse the approach taken by numerous federal appellate courts and hold that the First Amendment access right encompasses civil proceedings and documents.[8]

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7. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 516 (1984) (Stevens, J., concurring) ("distinction between trials and other official proceedings is not necessarily dispositive or even important, in evaluating the First Amendment issues"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open"); *Gannett Co. v. Depasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil as well as criminal trials have traditionally been open to the public.").

8. This Court recognized that a civil trial is "a public event" over forty years ago. *Craig v. Harney*, 331 U.S. 367, 374 (1947). Today at least *seven* Courts of Appeals have recognized some First Amendment right of access to civil proceedings. *E.g., Anderson v. Cryovac, supra* (recognizing limited First Amendment interest in access to unfiled civil discovery materials); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal.), *aff'd*, 10 Media L. Rep. (BNA) 2430 (9th Cir.), *cert. dismissed*, 105 S.Ct. 768 (1984) (recognizing First Amendment right of access to documents filed during pretrial civil proceedings); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 3478 (1985) (recognizing First Amendment right to attend civil trials); *Publicker Industries v. Cohen*, 733 F.2d 1059, 1069-70 (3d Cir. 1984) (recognizing First Amendment right of access to civil trials); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (recognizing First Amendment right of access to pretrial civil proceedings and evidence

(Continued on following page)

In considering whether the First Amendment right of access applies to particular judicial records or proceedings, this Court has looked to two complementary considerations. "First, because a tradition of accessibility implies the favorable judgment of experience," the Court has "considered whether the place and process has been open to the press and general public." *Press-Enterprise II*, 106 S.Ct. at 2740. Second, the Court has "considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

The Florida Supreme Court addressed neither issue, instead relying solely on *Seattle Times* and its earlier decision in *Burk*, in which the court also failed to address the issues. Thus, that Florida *never had* a rule against public access to civil depositions and discovery materials, that the press had actually attended many such depositions since the inception of the discovery rules, and that materials filed by the parties had been presumptively open to the public, were facts of no import to the court.[9]

Footnote continued—

introduced therein); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (recognizing First Amendment right of access to documents introduced in civil proceeding); *see also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (recognizing First Amendment right of access to civil trials relating to prison conditions and prisoner release).

9. Whether discovery proceedings have historically been closed to the public is an issue that deserves far greater attention from this Court. Substantial historical evidence exists that depositions under the common law, although rare, did occur and were open to the public at the discretion of the presiding magistrate or "Examiner," not of the parties. Daniell, *Chancery Pleading and Practice*, Vol. I, 906 (6th Am. Ed. 1894) ("The Examiner has power to admit or exclude the public, as he thinks fit."); *Wright v. Wilkin*, 4 Jur.N.S. 804, 805 (1885) ("As to the public or the short-hand writer, I think the examiner has power to do just as he thinks fit; if he imagines that he is precluded

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Similarly, the court never considered the structural importance of public access to the civil discovery process. Such access is crucial for the public to understand Florida's largely pretrial judicial system, a system in which fewer than 92% of all cases culminate in a public trial. The court offered no assessment of the need for pretrial access in these cases, or of the public benefit that access to the discovery process would provide. Consequently, the Florida court departed from this Court's access tenets in at least two fundamental ways.[10]

First, it is clear that each of the First Amendment interests supporting access to criminal trials identified by this Court in *Richmond Newspapers, Inc. v. Virginia*, 448

Footnote continued—

from admitting any persons except the parties, their legal advisers, and the witnesses, I think he is not right."). The Daniell treatise was followed in the leading Florida treatise on the subject. R.H. Armstrong and W.P. Donahue, *Florida Chancery Jurisprudence* § 334 (1927) ("The examination of witnesses may be conducted in public or private, as the officer may determine."). By statutory mandate, Florida courts of the period were required to observe English practice where, as here, Florida and federal rules were silent. Act of Nov. 7, 1828, § 35 (1881); *Long v. Anderson*, 48 Fla. 27, 37 So. 216, 219 (1904).

But see Reporters' Committee, supra.

10. In addition, the *Burk/Gridley* rule as applied to criminal cases raises serious Sixth Amendment concerns. As the Court noted in *Press-Enterprise II*, "[t]he right to an open trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II*, 106 S.Ct. at 1740; *see Waller v. Georgia, supra.* It is at this juncture that the Sixth Amendment rights of the criminal defendant and the First Amendment rights of the public are coextensive. The *Waller* Court observed that the need for open suppression hearings "may be particularly strong" because "[a] challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." 467 U.S. at 47. The *Burk/Gridley* rule, because it grants the prosecution the power to close an unfiled deposition even when the defendant objects, thus presents a clear threat to the fundamental constitutional rights of both criminal defendants and the public.

U.S. 555 (1980), applies with equal force to access to unfiled discovery materials in Florida's largely pretrial system of civil justice. Each of the interests served by access to trials—"fairness," "the perception of fairness," "public understanding of the rule of law" and the case at hand, "the community therapeutic value" of observing the process, the deterrence of wrongdoing, and the communication of information relevant to informed discussion of the system; *id.* at 570-73—is served by access to discovery material. Indeed, the interests served by access to trials can *only* be served by access to such material in Florida, since depositions and other discovery often provide the only meaningful avenue of public access to the process. As this Court recognized in relation to California's preliminary hearing in *Press-Enterprise II*, a procedure which provides "the sole occasion for public observation" of the judicial system must be open to public view. *Press-Enterprise II*, 106 S.Ct. at 2743, *quoting Richmond Newspapers*, 448 U.S. at 572.

Second, the Florida Supreme Court has judicially created a rule against access which is as absolute as the mandatory closure statute invalidated by this Court in *Globe Newspaper Co. v. Superior Court.* This Court has consistently stated that the adjudication of access claims requires a rule which will accommodate competing interests; consequently, *per se* or mandatory closure rules are inappropriate. As the Court noted in *Globe Newspaper, supra,* at 608, even a "compelling" interest "does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." The locus of authority to make decisions regarding access is the trial judge who must articulate specific findings to support closure on a

case-by-case basis; it is not the parties acting in their own narrow self-interest. *Id.* Moreover, particular closure orders must be narrowly tailored to serve compelling or overriding state interests. *Press-Enterprise II,* 106 S.Ct. at 2743; *Press-Enterprise I,* 464 U.S. at 510; *Globe Newspaper,* 457 U.S. at 606-07.

The *Burk/Gridley* rule satisfies none of these requirements. It is an absolute *per se* rule which does not permit the accommodation of competing interests. The traditional authority of the trial court to decide public access claims is replaced by the whim of a single party. No compelling state interest was presented to justify the imposition of this *per se* closure rule. That *some* depositions or discovery materials may contain private information does not justify a rule that seals *all* unfiled depositions and discovery materials irrespective of whether they contain any sensitive information.

CONCLUSION

Whether considered in light of *Seattle Times* or this Court's First Amendment access cases, the decision of the Florida Supreme Court is in error and signals the widespread need for guidance by this Court. The issue of public access to unfiled discovery materials was certified to the Florida Supreme Court for resolution because it was a matter of "great public importance" to the people of Florida. The number and variety of courts to have considered the same issue demonstrates that its importance is nationwide. Likewise, the fact that the Florida rule has been both followed and contradicted in state and federal courts across the country shows that the issue is ripe

for this Court's resolution. Finally, the extraordinary result of the rule adopted by the Florida court was to deny the public access to information directly pertaining to the fitness for office of a candidate for reelection to the United States Senate on the eve of the election. In light of the significance of this issue, and the pronounced conflicts among the circuits in deciding it, we respectfully submit that this Petition for a Writ of Certiorari be granted.

DATED: Miami, Florida
January 15, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served January 15, 1988, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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I further certify that all parties required to be served have been served.

GERALD B. COPE, JR.

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Motion of The Miami Herald Publishing Company and the Florida Publishing Company for Leave to Intervene and for Access to Discovery Materials and Memorandum of Law in Support Thereof (October 28, 1986)

MIAMI HERALD PUBLISHING COMPANY, et al.,
Petitioners,

v.

Honorable William Carter GRIDLEY,
Judge, et al., Respondents.

No. 69684.

Supreme Court of Florida.

July 2, 1987.

Rehearing Denied Sept. 3, 1987.

The District Court of Appeal, 496 So.2d 259, certified question. The Supreme Court, Ehrlich, J., held that unfiled discovery materials in civil case are not accessible to public and press.

Certified question answered in negative.

Barkett, J., concurred in result only.

* * *

EHRLICH, Justice.

We have for our review *Sentinel Communications Co. v. Gridley,* 496 So.2d 259, 260 (Fla. 5th DCA 1986), wherein the district court certified the following question of great public importance:

> ARE UNFILED DISCOVERY MATERIALS IN A CIVIL CASE ACCESSIBLE TO THE PUBLIC AND HENCE TO THE PRESS?

We have jurisdiction, article V, section 3(b)(4). Florida Constitution, and answer this question in the negative

based on our recent decision in *Palm Beach Newspapers v. Burk*, 504 So.2d 378 (Fla.1987).

We recognize, of course, that our decision in *Burk* dealt with this issue in the context of criminal proceedings. However, the rationale employed in *Burk* leads us to the same conclusion here concerning the right of access in civil proceedings. We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

Accordingly, we answer the certified question in the negative and approve the decision of the district court below.

It is so ordered.

McDONALD, C.J., and OVERTON, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 3, 1987

CASE NO. 69,684

MIAMI HERALD PUBLISHING CO., etc., et al.,
Petitioners,

v.

WILLIAM CARTER GRIDLEY, et al.,
Respondents.

District Court of Appeal, 5th District - No. 86-1893

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for Petitioner, The Miami Herald Publishing Company, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

McDONALD, OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur BARKETT, J., dissents

SENTINEL COMMUNICATIONS COMPANY, The Miami Herald Publishing Company, a division of Knight-Ridder, Inc., and The Florida Publishing Company, Petitioners,

v.

Honorable William Carter GRIDLEY, Paula Hawkins, W.E. Hawkins, Cowles Broadcasting, Inc., and Channel Two Television Co. of Florida, Respondents.

No. 86-1893.

District Court of Appeal of Florida,
Fifth District.

Oct. 31, 1986.

Petition to Review Order Excluding the Press A Case of Original Jurisdiction.

* * *

PER CURIAM.

The petitioners seek review pursuant to Florida Rule of Appellate Procedure 9.100(d) of an order entered October 30, 1986, by the Honorable William C. Gridley, denying them access to *unfiled* discovery materials. The trial court relied on the case of *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985). The petitioners do not controvert the finding of Judge Gridley that the requested materials have not been filed of record in the circuit court.

Based upon the *Palm Beach* case and the prior opinion of this court in *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980), we deny the petition. *See also Seattle Times Corp. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2119, 81 L.Ed.2d 17 (1984). Pursuant to Florida Rules of Appellate Procedure 9.125 and 9.030(a)(2)(B), we certify the following question to the Florida Supreme Court as a question of great public importance:

> ARE UNFILED DISCOVERY MATERIALS IN A CIVIL CASE ACCESSIBLE TO THE PUBLIC AND HENCE TO THE PRESS?

DENIED.

UPCHURCH, C.J., and ORFINGER and COBB, JJ. concur.

IN THE CIRCUIT COURT
ORANGE COUNTY, FLORIDA

CASE NO. 86-41

PAUL HAWKINS and W. E. Hawkins,
her husband,
Plaintiffs

vs.

COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Defendants

ORDER ON MOTION TO INTERVENE AND TO COMPEL ACCESS TO DISCOVERY MATERIALS

This matter came on before the Court on October 29, 1986 on Motion to Intervene and to Compel Access to Discovery Materials filed by The Sentinel Communications Company, L. John Haile, The Miami Herald Publishing Company and Florida Publishing Company. The Court heard argument of counsel for each of the parties and after full review of the file and case law, it is thereupon

ORDERED AND ADJUDGED as follows:

1. Apart from the Florida Rules of Civil Procedure, which do not appear to encompass or contemplate the situation presented herein, the "Intervenors" do have standing to raise the issues herein before this Court. See *Sentinel Star Company v. Edwards,* 387 So2d 367 (Fla.

5th DCA 1980) where a similar matter was raised by an ore tenus motion before the trial judge.

2. The "Intervenors" ' Motion to Compel Access to unfiled discovery materials is denied. This trial Court considers itself bound by the appellate decision of *Palm Beach Newspapers, Inc. v. Burk,* 471 So2d 571 (Fla. 4th DCA 1985) which denied such access in an extensive and thorough en banc opinion and also certified this very issue to the Florida Supreme Court as being a question of great public importance. This issue is presently pending before the Florida Supreme Court.

DONE AND ORDERED in Chambers at Orlando, Florida this 30th day of October, 1986.

/s/ William C. Gridley
William C. Gridley, Circuit Judge

IN THE CIRCUIT COURT OF THE
9TH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NO. CI-86-41

PAUL A. HAWKINS, and W. E. HAWKINS,
Plaintiffs,

v.

COWLES BROADCASTING INC. and CHANNEL TWO
TELEVISION CO. of Florida,
Defendants.

Florida Bar Number 160643

MOTION OF THE MIAMI HERALD PUBLISHING COMPANY AND FLORIDA PUBLISHING COMPANY FOR LEAVE TO INTERVENE AND FOR ACCESS TO DISCOVERY MATERIALS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rule 1.230, Florida Rules of Civil Procedure, The Miami Herald Publishing Company, a division of Knight-Ridder Inc., and Florida Publishing Company, publisher of the Florida Times Union, move for leave to intervene in this action for the limited purpose of obtaining access to deposition transcripts and other discovery materials (collectively "the Records") directly relating to the fitness of Plaintiff United States Senator Paula Hawkins to serve another term in the Senate of

the United States and for access to the Records. The grounds for this motion are:

1. This suit is not an ordinary personal injury suit. In this case, the plaintiff is a United States Senator. The fitness of a United States Senator to hold office is always a matter of great public concern. That concern is particularly urgent where, as here, a Senator is seeking reelection for an additional six year term. The discovery documents at issue are relevant to Senator Hawkins' fitness to serve in two fundamental ways. First, if the Records show she is seriously incapacitated, either by her injury or the medication she requires because of it, they are relevant to her *physical* fitness to hold office. Second, the Senator has repeatedly asserted during the campaign that she has no health problems which could affect her ability to perform her duties as a United States Senator. If the Records show that she has such health problems, they are germane to her truthfulness and consequently the fitness of her character to hold public office. For these reasons, the public has a right to know the facts contained in the Records before deciding whether to vote for Senator Hawkins' reelection. If the Records show the Senator is in good health and has no such disability, she can have no basis for opposing public access to these documents.[1]

2. Discovery materials produced in accordance with the Florida Rules of Civil Procedure are presumptively open to the public and may be sequestered from public

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1. If the Records show the Senator is not incapacitated but has nonetheless filed a lawsuit claiming that she is, access to the records is still directly relevant to her truthfulness and the fitness of her character for public office.

view only by entry of a protective order based upon "good cause" shown. Rule 1.280(c), Fla.R.Civ.P. No "good cause" to limit access to the Records exists.

3. The Records sought here are an integral part of the litigation process and are therefore presumptively open to the public under Florida's common law. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982); *State ex rel. Miami Herald Publishing Co. v. Mcintosh*, 340 So.2d 904 (Fla. 1977); *Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986); *Sentinel Star Co. v. Edwards*, 387 So.2d 367 (Fla. 5th DCA 1980). In order to overcome the common law presumption of access, the Senator must show (1) that closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) that no less restrictive alternative is available, and (3) that closure will achieve the court's purpose. *Miami Herald Publishing Co. v. Lewis, supra*, at 6; *Goldberg v. Johnson, supra*, at 1389. There are no compelling reasons to deny access under Florida's common law test for closure.

4. The qualified First Amendment right of public access to the judicial process applies with full force to civil litigation, because there is both a history of access to civil materials and access to them serves a critical role in the democratic system. *Press-Enterprise Co. v. Superior Court*, ... U.S. ....., 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*); *In re Coordinated Pretrial Procedings In Petroleum Products Antitrust Litigation*, ... F.2d ....., 10 Media L.Rep. (BNA) 2430 (9th Cir. 1984), *cert. dismissed*, 105 S.Ct. 768 (1984). Under the First Amendment, access may be denied only after proof of

an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II, supra,* 106 S.Ct. at 2741. No such interest is present here.

MEMORANDUM OF LAW

In paragraph 7 of her Amended Complaint For Damages, Senator Hawkins alleges she is suffering and will continue to suffer an injury which has become a physical handicap impairing her ability to work:

> . . . Plaintiff Paula Hawkins was injured in and about her body and extremeties, suffered pain thereupon, incurred medical expenses in the treatment of said injuries, *suffered physical handicap and her working ability was impaired; said injuries are either permanent or continuing in nature and plaintiff will suffer such losses and impairment in the future.* (emphasis added).

Similar allegations are made in paragraph 8 of the Amended Complaint.

The possible impairment of the ability of a United States Senator to perform her work is always of the greatest public concern, but this concern assumes particular urgency when that Senator is in the process of running for re-election. The Records sought here relate directly to the ability of Paula Hawkins to continue in her position as a United States Senator. Clearly, the legitimate public interest in the Records could not be greater, nor the reasons for granting access more compelling.

ARGUMENT

I. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT SHOW "GOOD CAUSE" UNDER THE FLORIDA RULES OF CIVIL PROCEDURE FOR RESTRICTING ACCESS

The Florida Rules of Civil Procedure unequivocally state that a party seeking to restrict public access to depositions and discovery materials must make a showing of "good cause" to justify the restriction:

> Upon motion by a party . . . and for good cause shown, the court . . . may make an order . . . (5) that discovery be conducted with no one present except persons designated by the Court, (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way, (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened by the Court.

Rule 1.280(c), Fla.R.Civ.P. Except for the Fourth District, every appellate court to have considered the issue has concluded that public access to pretrial depositions and discovery materials can be restricted only upon a showing of "good cause." As the Fifth District held in an opinion binding on this Court:

> We therefore conclude that the press does not have an absolute right to attend the taking of a deposition, that its presence may be regulated by the court under Rule 1.280(c)."

Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980). *Accord Miami Herald Publishing Co. v. Estrada,* ..... So.2d ....., (Fla. 3d DCA 1986) (*en banc*) (slip opinion), *app. pending,* Case No. 68, 624 (Fla. 1986); *Short v. Gaylord Broadcasting Co.,* 462 So.2d 591 (Fla. 2d DCA 1985); *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979); *Sentinel Star Co. v. Booth,* 372 So.2d 100 (Fla. 2d DCA 1979). *But see Palm Beach Newspapers v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985) (*en banc*), *app. pending* Case No. 67,352 (Fla. 1986).

Senator Hawkins has claimed in her lawsuit that she has suffered a "permanent or continuing" "physical handicap" which has "impaired" her "working ability." Amended Complaint, ¶7. There can be no "good cause" to keep from the voting public the Records which bear directly on the alleged "handicap" of a candidate for re-election to the United States Senate. Access must be granted.

II. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT OVERCOME FLORIDA'S COMMON LAW PRESUMPTION OF ACCESS TO CIVIL DISCOVERY RECORDS AND PROCEEDINGS

There is no question that the Florida common law presumption of public access applies to civil cases. The Florida Supreme Court has so stated in *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904, 908 (Fla. 1977):

> [T]he public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil.

The Fifth District has likewise held the common law right of access applies to civil proceedings. *Sentinel Star Co. v. Edwards,* 387 So.2d 367, 374 (Fla. 5th DCA 1980) (post-trial hearing relating to juror interviews in a wrongful death action) ("The press and public had a common law right of access to the hearing."). Other Florida appellate courts have uniformly applied the right of access to civil proceedings, absent special circumstances.[2] *Goldberg v. Johnson,* 485 So.2d 1386 (Fla. 4th DCA 1986); *State ex rel. Gore Newspapers Co. v. Tyson,* 313 So.2d 777, 783 (Fla. 4th DCA 1975), *overruled on other grounds, English v. McCrary,* 348 So.2d 293 (Fla. 1977)

Florida has adopted a three-part test for denying public access to deposition transcripts and other civil discovery proceedings and records. The general "good cause" standard for protective orders under the Florida Rules of Civil Procedure[3] must be construed consistently with this common law standard. A movant seeking to exclude the public from civil discovery materials must therefore show:

1) the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration

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2. The recent decision in *Sentinel Communications Co. v. Smith* ..... So.2d ....., 11 F.L.W. 1484 (Fla. 5th DCA 1985) involves a litigant's asserted right of privacy in a divorce proceeding and is thus inapposite for at least two reasons. First, this is not a divorce case. Second, there can be no privacy claim here since, by her decision to run for re-election, the Senator has made her health a public issue. *Jacova v. Southern Radio & Television Co.,* 83 So.2d 34 (Fla. 1955).

3. Federal cases concur that the common law presumption of access applies to civil discovery materials. *Nixon v. Warner Communications, Inc.,* 435 U.S. at 597-98; *In re Coordinated Pretrial Proceedings, supra.*

of justice; 2) no less restrictive alternative measures are available which would mitigate the danger; and 3) the measure being considered will in fact achieve the court's protective purpose.

Goldberg v. Johnson, supra, at 1389 (unsealing civil guardianship proceedings). *Accord Sentinel Star Co. v. Booth, supra* (criminal depositions). *See also Miami Herald Publishing Co. v. Lewis, supra.* Senator Hawkins cannot satisfy any part of this rigorous standard.

III. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT SHOW THAT CLOSURE IS ESSENTIAL TO PRESERVE HIGHER VALUES, AS REQUIRED BY THE FIRST AMENDMENT

The United States Supreme Court has recognized a qualified First Amendment right of public access to judicial proceedings. *Press-Enterprise II, supra; Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). This right clearly extends to civil discovery proceedings. *Press-Enterprises II,* 106 S.Ct. at 2740 ("[T]he First Amendment question cannot be resolved solely on the label we give an event, *i.e.,* "trial" or otherwise."); *Press-Enterprise I, supra* (Stevens, J. concurring); *Richmond Newspapers Inc. v. Virginia,* 448 U.S. at 580 n. 17 (1980); *In re Coordinated Pretrial Proceedings, supra; Westmoreland v. C.B.S.,* 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Industries v. Cohen,* 733 F.2d 1059 (3d Cir. 1984); *In the Matter of Continental Illinois Securities Litigation,* 732 F.2d 1302 (7th Cir. 1984); *Brown and Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d

1165 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

In determining whether the First Amendment right of access applies to particular proceedings or records, courts must look to two considerations:

> [f]irst, . . . whether the place and process has historically been open to the press and general public . . . [and] [s]econd, . . . whether public access plays a significant positive role in the functioning of the particular process in question.

Press-Enterprise II, 106 S.Ct. at 2740 (citation omitted).

Both considerations support access here. First, there is a tradition of access. The rules of procedure historically required parties to place deposition transcripts and discovery documents in the open court file.[4] Second, public access in this case serves fundamental societal interests. The Records offer the voting public the unique opportunity to evaluate the fitness for office of a United States Senator running for re-election, as well as the

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4. That discovery materials and dispositions no longer are required to be filed is of no legal consequence because the change in the rules was strictly a "housekeeping" rule enacted "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system." *In re Florida Rules of Civil Procedure*, 403 So.2d 926 (Fla. 1981). Florida courts retain the power to order the material to be filed. Rule 1.310(f) & Rule 1.350(d), Fla.R.Civ.P.

The comments to the parallel federal rules make it clear that third parties continue to enjoy a right of access to discovery materials even if the materials are unfiled. *See* Rule 5(d), Fed.R.Civ.P.; Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978) ("It is intended that the Court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c)."); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 567 (E.D.N.Y. 1985).

chance to observe her behavior in her own civil tort action.

Although the First Amendment right of access is *qualified*, not *absolute*, "[i]t may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 106 S.Ct. at 2741, *quoting Press-Enterprise I*, *supra* at 510. This interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* Senator Hawkins has no "overriding interest" sufficient to overcome the intense public interest in the Records relating to the elective and judicial processes at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should permit intervention and grant access to the Records.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion Of The Miami Herald Publishing Company and Florida Publishing Company For Leave To Intervene And For Access To Discovery Materials And Memorandum Of Law In Support Thereof was served by hand *before noon* on October 28, 1986, upon the following:

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SUPREME COURT, U.S.
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NO. 87-1193

in the

Supreme Court

of the

United States

October Term, 1987

THE MIAMI HERALD PUBLISHING COMPANY,

Petitioner,

vs.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W. E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,

Respondents.

RESPONDENTS', PAULA HAWKINS AND W. E. HAWKINS, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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47pp

INTRODUCTION

Three months ago, in *Palm Beach Newspapers, Inc. v. Burk*, Case No. 87-508, this Court denied an identical petition, filed by the same petitioner. That denial occurred on November 16, 1987, two months before the Miami Herald's petition in this case. *Palm Beach Newspapers, Inc. v. Burk*, ____ U.S. ____, 98 L.Ed. 2d 372, 108 S.Ct. 346 (1987). That fact is strangely absent from the petition in this case.

For all intents and purposes this case is a mirror image of *Burk*. The decision below involved the same issue and reached the same result. Indeed, the decision below is a simple affirmance on the authority of *Burk*. (A. 2-3). The sameness of this case to *Burk* is best demonstrated by the fact that the petition here is, in virtually all material parts, verbatim to the Miami Herald's *Burk* petition.

This petition does not claim any intervening circumstances since the *Burk* denial nor does it present any grounds not urged in *Burk*. It is then in reality an impermissible petition for rehearing of the denial of certiorari in *Burk*. Nonetheless, respondents must reply to this petition. They therefore restate the question as follows:

QUESTION PRESENTED FOR REVIEW

Whether news organizations have a First Amendment right enabling them to use the courts to gather news by compelling private litigants to disclose information exchanged between the litigants, which has not been made a part of any public record or judicial proceeding.

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RESPONDENTS', PAULA HAWKINS AND W. E. HAWKINS, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondents, Paula Hawkins and W. E. Hawkins, respectfully pray that the Petition for Writ of Certiorari filed by the Miami Herald Publishing Company be denied.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is remarkable for what it fails to disclose and for its continual efforts to try to recast this case as being one of a denial of "access." The news media, including petitioner, was never denied access to any judicial proceeding or to any court records and no amount of semantics can change that fact. The only denial in this case was of the news media's motion to compel the litigants to divulge private matters that had been exchanged between them.

Paula Hawkins was injured when a television studio set wall struck her during the taping of a T.V. talk show. Although the incident was recorded on videotape, the defendant television station impounded the tape and it has never been made public to this very day.

The Hawkins' lawsuit was filed in Orlando, Florida, in January 1986. It proceeded in orderly course until October 21, 1986. During those ten months, media representatives attended hearings and prominently reported events concerning the case. The media quoted from the pleadings and orders of the court and the information was distributed nationwide by Associated Press. (A. 28-40).[1] At no time during that ten month period did the media make any complaints concerning access.

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[1]Petitioners omitted material parts of the record from the Appendix they filed. Accordingly, the plaintiffs have filed a Supplemental Appendix A. Its numbering begins at A-21, so that it runs consecutively from the petitioner's Appendix. The newspaper clippings in respondents' Appendix are intended to be representative but not exhaustive of the media coverage.

On October 21, 1986, the Orlando Sentinel filed an unprecedented Motion to Intervene and Compel Access to Records. The Sentinel asked the trial court to force the parties to turn over to it (1) plaintiffs' answers to interrogatories, (2) transcripts of depositions of treating physicians, (3) all medical records, hospital records and hospital bills; and, (4) a videotape of the injury incident. The Sentinel contended that even though the documents and videotape had never been filed in any record or proceeding, they were "public records and should be made public under the Florida Public Records Law." Alternatively, the Sentinel contended that the materials "should be made public under the federal and Florida constitutional law." (A. 21-27).

The Sentinel did not seek the materials to understand Florida's judicial system. Its desire for the materials had nothing to do with the case or the court process but dealt solely with an upcoming election in which Mrs. Hawkins was a candidate for to the United States Senate. The election was only about two weeks away and the materials would, according to the Sentinel, reflect on either Mrs. Hawkins' physical fitness or her integrity. In the Sentinel's view, these were newsworthy matters and the Sentinel wanted the trial court's assistance in gathering the materials. As the Sentinel explained, the parties had refused its requests to voluntarily give it the materials. (A. 23).[2]

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[2]Both plaintiffs and defendants refused to litigate their case in the news media. They had a constitutional right to do so. Wooley v. Maynard, 430 U.S. 705 (1977) (The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." Id. at 714).

The Sentinel therefore wanted to make the trial court its news gathering partner and have the trial court order the parties, under pain of contempt, to turn over the materials.

A week later, the petitioner herein, the Miami Herald Publishing Company, and the Florida Publishing Co. (Florida Times Union) jointly filed a similar motion. With the exception of the "public record" contention, which was omitted from the Miami Herald's motion, its position was identical to the Sentinel's. (A. 9-19). Although the defendants in the main case were also members of the media—the owners and operators of the Orlando television station where the injury occurred—they did not join in the motions and in fact opposed them.

It was then, as it is now, the intervenor news organizations' position that they have a right of unlimited access to any civil litigation, that they have the right to use the courts to gather news and that any civil litigant can be compelled to turn over to them whatever materials they wished. Both plaintiffs and defendants opposed the motions to intervene and compel. On hearing, the trial court granted the intervention but denied the motion to compel. (A. 7-8).

The intervenor news organizations then sought review of that order in the Fifth District Court of Appeal. The District Court denied their petition, noting that the intervenor news organizations did "not controvert the finding of [trial judge] that the requested materials have not been filed of record in the circuit court." (A. 5).

In June 1987, the Hawkins and the defendants in the main case reached an amicable settlement and their litigation was terminated. However, the news organizations continued with their efforts to reverse the denial of their motion to compel. In July 1987, with rehearing being denied in September 1987, the Florida Supreme Court approved the decision of the Fifth District Court of Appeal. (A. 3).

The Florida Supreme Court based its decision on its earlier decision in *Palm Beach Newspapers v. Burk*, 504 So2d 378 (Fla. 1987). In *Burk*, the Florida Supreme Court held that the press had no First Amendment right to participate in pretrial discovery or to obtain copies of depositions that were not filed with the court. *Id.* at 382. The *Burk* decision went on to hold that under Florida procedural law, common law and public records law there was likewise no right to participate in pretrial discovery. *Id.* at 383-84.

Because the Florida Supreme Court below simply relied on *Burk*, the petitioner's argument here is a virtual repeat of its petition in *Burk*. In view of the recent denial of the Miami Herald's petition in *Burk* and the lack of any new arguments in this petition, respondent requested that petitioner withdraw this petition. (A. 41-42). Petitioner has failed to do so.

REASONS FOR DENYING THE WRIT

This case presents no new issue that has not already been before this Court in *Burk* as well as a number of other decisions cited below. Beyond that, petitioner's principal argument—that this Court should grant the

writ so as to be able to give "guidance" to other courts—standing alone is not a proper basis for the granting of a writ. In an effort to avoid the pivotal issue of whether there is any First Amendment rights involved in this case, petitioner disingeniously paints with a broad brush. But, no amount of obfuscation can obscure the fundamental fact that there is no basis for certiorari unless the Florida Supreme Court transgressed controlling constitutional rights. That could not have occurred because it is clear that the news media has no First Amendment right to compel litigants to divulge information to them.

That is the express holding of some of the very cases cited by petitioner, a fact which petitioner fails to acknowledge. See *The Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987) ("The publisher's claim of a first amendment right of access to the fruits of discovery is equally unsound." *Id.* at 366); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) (Newspaper publisher and journalist possess no First Amendment rights to examine discovery materials); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (There is no First Amendment right of access to documents considered in civil discovery motions); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986) *cert. den.* ____ U.S. ____, 56 LW 3396 (Dec. 8, 1987) (Discovery process is not a forum traditionally open to the public and is a matter of legislative grace to which no First Amendment rights attach); and *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (No First Amendment right of access to pre-trial materials, principally depositions and discovery documents).

This Court has discussed the extent of news organizations' First Amendment rights concerning trial proceedings on several occasions. In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) this Court noted that the First Amendment did not confer any rights on the media concerning a trial greater than that of the general public.

> The First Amendment generally grants the press no right to information about a trial superior to that of the general public. . ." [T]he line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public."

Id. at 609. See also *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.") It is stating the obvious to say that a general member of the public has no right whatsoever to intervene in private ligitation, much less compel production of materials from the litigant's lawyer's files.

More specifically, there is no constitutional right for either the public or the news media to participate in pretrial proceedings or discovery. In *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) Chief Justice Burger noted in a concurring opinion that the draftsmen of the Constitution were well aware of pretrial proceedings:

> Yet no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings as were available in that time; until the trial it could not be known whether and to what extent the pretrial evidence would be offered or received. Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence.

Id. at 396.[3] *Gannett* did not specifically consider whether there was a First Amendment right of access. However, that issue was addressed in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984). There this Court noted:

> [P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or

[3]A more detailed discussion of the historical nature of the discovery process, reaching the same conclusion, appears in In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1332-1336 (D.C. Cir. 1985) and Anderson v. Cryovac, 805 F.2d 1, 12-13 (1st Cir. 196).

> only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information. (Citations omitted.)

Id. at 33. As noted by this Court in *Zemel v. Rusk,* 381 U.S. 1 (1965):

> The [First Amendment] right to speak and publish does not carry with it the unrestrained right to gather information.

Id. at 17.

Several other decisions have come to the same conclusion. See *United States v. Gurney,* 558 F.2d 1201 (5th Cir. 1977) holding that the news media's right

> to gather news has been defined in terms of information available to the public generally. . . . The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally. . . . The documents sought by appellants were not part of the public record. In keeping with present Supreme Court guidelines, we do not think that the press had any First Amendment right of access to those matters not available to the public.

Id. at 1208, 1209.

To the same effect are *Booth Newspapers, Inc. v. Midland Circuit Judge,* 377 NW 2d 868 (Mich. Ct. App. 1985) *leave to appeal den.,* 425 Mich. 854 (Mich. 1986), *cert. den.,* 107 S.Ct. 877 (1987), (Press has no right, either constitutionally or via common law, to compel disclosure of pretrial discovery information); *Lewis R. Pyle Memorial Hospital v. Superior Court,* 717 P.2d 872 (Ariz. 1986) (Pretrial depositions are not public proceedings and neither the public nor press has any right, constitutional or other wise to attend); *Oklahoma Hospital Association v. Oklahoma Publishing Co.,* 748 F.2d 1421 (10th Cir. 1984) *cert. den.* 473 U.S. 905 (1985) (Press has no First Amendment right to compel litigants to disseminate information they have obtained through litigation processes).

Petitioner seems to be arguing that this Court should extend a First Amendment right, even though none may have existed before. Such a judicial redrafting of the Constitution would fly in the face of established precedent. In *Richmond Newspapers, Inc. v. Virginia,* 488 U.S. 555 (1980) this Court held that in deciding the scope of First Amendment rights with reference to judicial proceedings two inquiries must be made: (1) has the particular stage of the proceedings historically been open and (2) is a right of access essential to the proper functioning of the judicial process.

Apart from the lack of any historical precedent for compelling disclosure of discovery proceedings and matters, public access to discovery materials is not essential to an understanding or proper functioning of the judicial process. *In re Reporters Comm. for Freedom of the Press, supra* at 1337. Indeed, the Miami Herald

did not want the materials concerning Mrs. Hawkins for any purpose connected with the judicial process. They wanted the materials for the ulterior purposes of the elective process.

In sum, there is no First Amendment right for either news organizations or the public to compel private litigants to divulge discovery materials. That is as it should be. If the news media, or for that matter the public, had even a qualified right to compel disclosure of discovery materials, litigation would become infinitely more complex and burdensome. Such a rule would portend a staggering increase in the amount and cost of litigation. Since litigants would never know in advance when the media might seek information, such an eventuality would have to be considered in every case. If a party had any conceivable concern about disclosure, a motion would have to be filed, notice would have to be given to the media and a hearing would have to be held. If the media were dissatisfied with the amount or timing of discovery, other motions or appeals would follow. The result would be congestion, perhaps even havoc in the system. The costs would be incredible. The amount of judicial time that would be consumed is incalculable. And, all of this would come at a time when the courts are already over crowded. See *Anderson v. Cryovac, supra* at 12; *In re Reporters Comm. for Freedom of the Press, supra* at 1338; *Palm Beach Newspapers v. Burk,* 471 So2d 571, 579 (Fla. 4 DCA 1985).

There is another more subtle but potentially more insidious effect that could result. Such a rule would make the courts a tool for information gathering.

Through the court processes—subpoenas, contempt orders, sanctions, etc.—the media would have an extremely powerful club to force the disclosure of information. What then would happen to the public's confidence in the judicial system?

CONCLUSION

There is no First Amendment right to allow news organizations to compel private litigants to divulge information. There is likewise no conflict of decisions. The decision below is simply an application of state court decisional law, that conflicts with no constitutional principle or federal law. Accordingly the petition should be denied.

RULE 49.2 DAMAGES

By any standard this case is a classic example of a frivolous petition. It makes a mockery of any concept of finalty. If this petition were filed by someone other than the Miami Herald, it would constitute outright plagiarism of the Herald's *Burk* petition. If this petition were filed as a petition for rehearing in *Burk,* it would constitute a blatant violation of Rule 51.2. In view of the denial of certiorari in *Burk* just two months before, this petition is groundless, lacking in legal sufficiency and it unwarrantedly consumes the parties and Court's time. For these reasons, the respondent requests that this Court assess Rule 49.2 damages, together with the costs of this brief in opposition. Respondents have not incurred any delay damages since the underlying case has long since been resolved. Under those circumstances, respondents respectfully submit that an

amount of damages equal to a reasonable attorney's fee for this proceeding would be an appropriate amount of damages to be assessed.

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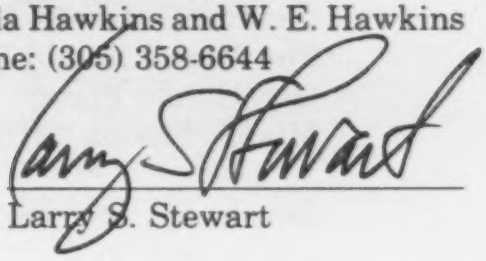
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief in Opposition was served February 19, 1988, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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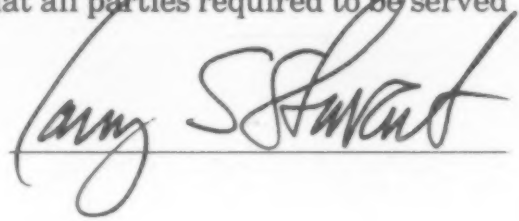

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IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND FOR
ORANGE, COUNTY, FLORIDA

CASE NO. CI-86-41

PAULA HAWKINS, and W. E. HAWKINS,
her husband,

Plaintiffs,

vs.

COWLES BROADCASTING, INC. and CHANNEL
TWO TELEVISION COMPANY OF FLORIDA,

Defendants,

**SENTINEL COMMUNICATIONS COMPANY'S
AND L. JOHN HAILE'S MOTION TO
INTERVENE AND MOTION TO COMPEL
ACCESS TO RECORDS**

COME NOW Movants SENTINEL COMMUNICATIONS COMPANY ("SENTINEL") and L. JOHN HAILE ("HAILE"), by and through their undersigned attorneys, and file this Motion to intervene and Motion to Compel Access to Records. In support of said Motions, Movants allege as follows:

1. Movant SENTINEL, a Delaware corporation with its principal place of business in Orange County, Florida, is the publisher of *The Orlando Sentinel*, a daily newspaper of general circulation in Central Florida.

2. Movant HAILE is a resident of Seminole County, Florida and is the Editor of *The Orlando Sentinel.*

3. Plaintiff PAULA HAWKINS is a United States Senator for the State of Florida currently running for reelection in the November 4, 1986 Florida general election. Plaintiff W. E. HAWKINS is the husband of PAULA HAWKINS.

4. Defendant CHANNEL TWO TELEVISION COMPANY OF FLORIDA was, at times relevant to this lawsuit, the owner of WESH-TV Channel 2, a television broadcasting station licensed by the Federal Communications Commission.

5. Movants have verbally requested of counsel for Defendants access to discovery materials delivered to Defendants pursuant to discovery demands in this lawsuit, to wit:

a. Plaintiffs' Answers to Interrogatories;

b. Transcripts of depositions of treating physicians of PAULA HAWKINS, a/k/a Paula Mandell; and

c. Medical records, hospital records, and hospital bills for PAULA HAWKINS, a/k/a Paula Mandell.

Movants have also requested access to the videotape of the incident in which PAULA HAWKINS was injured, copies of which tape have been provided by Defendants to Plaintiffs. In addition to the foregoing verbal requests, Movant SENTINEL has requested, in writing, access to Plaintiff's Answers to Interrogatories. The letter of request for such records is attached hereto as Exhibit "A".

6. Movants' requests for access to the foregoing records have been refused.

7. The records requested by Movants are public records and should be made public under the Florida Public Records Law (Chapter 119, Florida Statutes). All documents placed in a court file are public records available for public inspection. Prior to recent amendments to the Florida Rules of Civil Procedure, answers to interrogatories and deposition transcripts were filed in court files as a matter of course. The amendments to the Rules which abrogated the filing requirements were house keeping measures designed to ease file storage problems by decreasing the size of court files. The Rule amendments were not intended to make private records which were once public.

8. The records requested by Movants are public records and should be made public under Florida common law. Courts in the State of Florida have established, under the common law, a strong presumption of public access to the judicial system, including judicial proceedings and records. This presumption is particularly compelling, where, as in the case at bar, the records in question pertain to a matter

of the gravest public interest and concern, to wit: the health and fitness to serve of an individual seeking election as a United States Senator.

9. The records requested by Movants should be made public under federal and Florida constitutional law. The United States Supreme court has recognized news-gathering as a constitutionally protected activity. *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). The First Amendment implies the public's right to know, particularly under the unusual facts of this case.

10. The public policy of the State of Florida demands that the records requested by Movants be made public. Millions of Florida voters will cast their ballots on November 4, 1986 in the election for United States Senator. Florida voters have a compelling right to know the physical condition and fitness of PAULA HAWKINS as the incumbent candidate for that office. Florida voters have a compelling right to know whether PAULA HAWKINS has described her physical condition to the electorate of this State in a manner inconsistent with her sworn answers to interrogatories made under oath in this case. There can be no more substantial and compelling public interest than the interest of the voting public in being fully informed with respect to the integrity and the health and fitness of a candidate for the office of United States Senator.

11. For the reasons set forth above, Movant HAILE, as a taxpayer, voter, and member of the public, and Movant SENTINEL, as a newspaper publisher, have a direct and immediate interest in this pending litigation.

WHEREFORE, Movants respectfully request that this Honorable Court grant their Motion to Intervene and allow them to intervene in this case for purposes of pursuing their Motion to Compel Access to Records. Movants further request this Honorable Court to enter its order compelling the parties in this case to make available to Movants for inspection and copying the records referred to in Paragraph 5 above.

Respectfully submitted,

/s/ William G. Mateer, Esquire
WILLIAM G. MATEER, ESQUIRE

/s/ David L. Evans
DAVID L. EVANS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, this 21st day of October, 1986, by United States mail and by Airborne Express to LARRY S. STEWART, ESQUIRE, Stewart, Tilghman, Fox & Bianchi, P.A., 44 West Flagler Street, Suite 1900, Miami, Florida 33130, and by hand delivery to ALTON G. PITTS, ESQUIRE, 605 East Robinson Street, Orlando, Florida 32814.

/s/ David L. Evans

DAVID L. EVANS, ESQUIRE
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EXHIBIT "A"

The Orlando Sentinel
633 North Orange Avenue
Orlando, Florida 32801

October 16, 1986

Mr. Alton Pitts
P.O. Box 20154
Orlando, Florida 32814

Re: Hawkins v. WESH

Dear Mr. Pitts:

I am writing to request an opportunity to review the Answers to Interrogatories filed by Paula Hawkins.

As you know, the answers are not filed in the courthouse pursuant to procedure rules. However, when the Supreme Court revised those rules for housekeeping reasons, there was no intention stated that such documents would suddenly not be public record.

So I am left with depending upon the lawyers to release discovery documents previously considered public record.

I would appreciate a response from you by phone or writing as soon as possible.

Respectfully yours,

Craig Crawford,
Legal Affairs Reporter
305/420-5360

cc: Larry Stewart
David Evans

ORLANDO SENTINEL 1-4-86

Hawkins

Hawkins sues WESH over 1982 studio prop accident

By Dan Tracy

OF THE SENTINEL STAFF

U.S. Sen. Paula Hawkins filed a negligence suit Friday against WESH-Channel 2 for injuries she suffered four years ago when a studio backdrop fell on her while she was being interviewed at the Winter Park television station.

Hawkins, 58, was knocked unconscious briefly when a 28-pound, 6-foot-high wood and canvas prop toppled onto her neck and shoulders on Jan. 4, 1982.

She was hospitalized in Orlando for eight days. Hawkins complained then of neck and back pains, memory lapses and an inability to focus her eyes. She wore a neck brace for several months.

In her suit filed in Orange County Circuit Court, Hawkins contends she still feels pain and cannot work as well as she could before the mishap. The suit asks for more than $5,000, the minimum amount that can be requested in a civil action.

Hawkins charged that her husband has lost "the services of his wife and he has in the past and will in the future suffer a loss of the consortium and society of his wife."

The Republican senator from Winter Park did not return several calls, but an aide, Kevin Childers, said Hawkins sometimes is in "acute" pain, particularly after a long day in the Capitol.

"She is in traction practically every night," said Childers.

Hawkins has traction equipment in her Watergate Hotel apartment in Washington to help in the

Please see **HAWKINS, A-9**

From A-1

rehabilitation process, Childers said. She also had a small private room in the Capitol basement where she put herself in traction if necessary while the Senate was in session. Childers said Friday he "couldn't confirm" whether it is still there.

Hawkins has said frequently that the injury is aggravated by long hours of work and airline flights because of the pressure on her neck and spinal column during takeoffs and landings.

The statute of limitations for negligence suits runs out after four years. Today is the fourth anniversary of Hawkins' accident.

Childers said Hawkins' attorney, Larry Stewart of Miami, may still try to negotiate an out-of-court settlement.

"The senator trusts that in time things will be resolved between her and Channel 2," he said.

WESH station manager John E. Evans said he was not surprised by the suit.

"This is the way you pursue these things. I don't think it shows any hostile feelings towards us on her part. It certainly doesn't on our part," Evans said.

WESH has paid for some of her hospitalization costs, he said. "This is why you carry insurance," Evans said.

The station has attempted in vain to work out a settlement since the accident, Evans said. He would not disclose the amounts discussed.

Hawkins underwent surgery in 1960 to fuse a disc in her neck after an automobile accident and has refused a second operation to alleviate the pain she now feels. That operation would have only a 50 percent chance of success.

Childers said Hawkins' physical problems will not stop her from seeking re-election this year. She has raised more than $3 million for the race against Democratic Gov. Bob Graham, who is expected to announce his candidacy later this month.

Sentinel *Washington correspondent Anne Groer contributed to this report.*

orlando sentinel 2-19-86

Senator's doctor: Job delays healing

Hawkins

By Craig Crawford

OF THE SENTINEL STAFF

U.S. Sen. Paula Hawkins sought medical treatment at a North Carolina hospital last week because pressures on the job have delayed her recovery from an old neck injury, her Orlando physician said Tuesday.

"She called from Washington and said, 'I'm ready for Duke,'" said Dr. Ed Farrar, who has long urged Hawkins to undergo treatment at the Duke University Medical Center in Durham, N.C.

Farrar has treated Hawkins since January 1982 when she was struck on the neck and knocked unconscious by a falling prop at the Winter Park studio of WESH-Channel 2. He examined her twice in Washington and set up traction equipment in her Watergate apartment in Washington.

But Hawkins' rehabilitative progress was slowed by long hours of work, aggravated by a stepped-up campaign schedule in her re-election bid against Gov. Bob Graham, Farrar said.

"She has not achieved the medical goals I set for her," said Farrar, explaining that she suffers constant pain in her neck and lower back and has not regained a normal range of motion in those areas of her body.

Hawkins told reporters at a Senate hearing in Fort Lauderdale Monday that she was "as strong as ever," and she denied rumors that she has been addicted to pain-killing drugs.

Farrar said he occasionally alternated the types of muscle relaxant medications he prescribes for Hawkins because her body has "adapted" to the medicine, developing a tolerance for it.

He explained that after continued use, a certain amount of medication is no longer enough to relieve pain. Instead of increasing the dosage, Farrar said he has switched medications.

"It's like an alcoholic," said Far-

Please see **HAWKINS, A-9**

HAWKINS

From A-1

rar, "when two drinks won't do what two drinks used to do."

He suggested treatment at Duke several months ago because "they do the best work-up [treatment] on necks of anybody on the Eastern Seaboard."

In a press conference in Durham last Wednesday, Dr. Blaine S. Nashold Jr., a Duke University neurosurgeon, said he would decide this week whether surgery is necessary.

Farrar had no comment about Nashold's findings because he has not received a report of the examination. He will testify in a deposition in March that is part of a negligence suit Hawkins filed against WESH.

In the Orange Circuit Court suit, Hawkins claimed she still feels pain and cannot work as well as she could before the accident.

The television station filed an answer to the complaint last week admitting that Hawkins was injured in the studio but denying negligence for the accident.

"That's just the lawyers going through their ritual dance," said John Evans, WESH station manager.

Hawkins filed the suit in January the day before the fourth anniversary of the accident. Florida's statute of limitations prevents the filing of a negligence lawsuit more than four years after an accident.

Last December Hawkins asked for a financial settlement from the television station, said Al Pitts, WESH's attorney. He said the station, which has paid Hawkins' medical bills, rejected the amount she proposed and made no counteroffer.

"It was a huge figure," said Pitts, who would not state the amount.

Hawkins' attorney, Larry Stewart of Miami, would not comment about the case, saying, "I'm not going to try this lawsuit in the press."

Her top aide, Tom Kleppe, said he knew nothing about a settlement demand.

The uncertainty about Hawkins' future medical treatment prevents a settlement of the lawsuit, said Pitts.

"Until her medical situation is resolved, we cannot evaluate the case," he said. The suit is further complicated by questions about how much her current condition stems from 1960 neck surgery following an automobile accident, Pitts said.

Florida News

Senator mentions surgery at Easter

Associated Press

U.S. Sen. Paula Hawkins, R-Fla., who was recently hospitalized for chronic back and neck pain, says she might undergo corrective surgery around Easter.

"I won't know until next month about a definite date, but I suspect sometime around Easter break it might occur," Hawkins said at a Republican dinner Saturday in Punta Gorda.

The 59-year-old, first-term senator injured her neck and back 20 years ago in an automobile accident. The injury was aggravated four years ago when a backdrop fell on her at an Orlando television station where she was taping an interview.

Hawkins filed a lawsuit against WESH-Channel 2 alleging permanent or continuing injuries were caused by the backdrop and have impaired her ability to work.

Hawkins, whose bid for re-election is being challenged by Democratic Gov. Bob Graham, has said she will not withdraw from the race for medical reasons.

Living 'in chronic pain' a way of life for Hawkins

Associated Press

U.S. Sen. Paula Hawkins said the constant pain she lives with will not stop her campaign for a second term.

Hawkins

"Being in chronic pain is part of living. I believe it sharpens your wit, drives you further. You work harder," said the Florida Republican, who was recently hospitalized for back and neck pain.

Hawkins, who faces Democratic challenger Gov. Bob Graham in her re-election bid, also said she might undergo corrective surgery during the Easter holiday.

"I won't know until next month about a definite date, but I suspect sometime around Easter break it might occur," Hawkins said at a weekend Republican dinner in Punta Gorda.

The 59-year-old senator injured her neck and back 20 years ago in an automobile accident. The injury was aggravated four years ago when a backdrop fell on her at an Orlando television station while she taped an interview.

Hawkins has sued WESH-Channel 2, alleging permanent or continuing injuries were caused by the backdrop and have impaired her ability to work.

ORLANDO SENTINEL 3-20-86

MARCH 20, 1986

Channel 2 says Hawkins' bills have been paid

By Craig Crawford

OF THE SENTINEL STAFF

WESH-Channel 2 already has paid more than $11,000 in medical expenses to U.S. Sen. Paula Hawkins and would pay more if she submitted the bills, according to a document filed by the television station in Hawkins' negligence lawsuit against it.

Hawkins

The station, sued in Orange Circuit Court last January, has admitted that the Winter Park Republican was injured when a studio backdrop fell on her during an 1982 interview but denied any negligence.

Hawkins provoked a dispute over the medical bills last February when she claimed on the *CBS Morning News* that she had to file suit "since the TV station has not paid our bills."

That statement brought a sharp response from station manager John E. Evans, who said the bills were paid until

Please see **HAWKINS, B-3**

BEST AVAIL

HAWKINS

From B-1

Hawkins quit submitting them in 1984.

Hawkins' husband, Gene, then called Evans to apologize that the senator's remarks were misinterpreted, Evans said.

Evans said that medical bills submitted by Hawkins after a 1984 automobile accident in Washington, D.C., were rejected by the station's insurance company. Hawkins was a passenger in a car that was struck from behind by a taxi. She continued to the airport for a flight to Tampa.

When the plane landed, Hawkins, who complained of severe headaches from the auto accident, was transferred to a Coast Guard plane that took her to Orlando, where she was admitted to Orlando Regional Medical Center. She was released the next day.

Evans said the station's insurance carrier, Zurich-American Insurance Companies, contended that medical bills for Hawkins' injuries from the automobile accident were "hard to relate to the accident at our place."

Hawkins' history of neck and back problems has complicated efforts to blame her pain solely on the Channel 2 accident.

She underwent surgery in 1960 to fuse a disc in her neck after an automobile accident.

Legal and medical experts say it is difficult to distinguish how much of her pain is caused by the different accidents.

The lawsuit has put Hawkins in the position of maintaining that she is healthy enough to be a senator and an active campaigner against Democratic challenger Gov. Bob Graham while arguing in court that her injuries were severe enough to justify the damages she is seeking.

In the suit Hawkins contends she still feels pain and cannot work as well as she could before the mishap.

On the campaign trail Hawkins has called questions about her health a "false issue." She calls the legal claims about her injuries "just boilerplate language."

Hawkins entered Duke University Medical Center under an assumed name Feb. 6 while her Senate and campaign staff insisted she was vacationing. The full story finally emerged that weekend, and on Feb. 12 her physician held a press conference to discuss possible surgery.

She went to Duke because her Orlando physician, Dr. Ed Farrar, was dissatisfied with her progress.

"She has not achieved the medical goals I set for her," said Farrar in an interview earlier this month. He explained that Hawkins suffers constant pain in her neck and lower back and has not regained a normal range of motion in those areas of her body.

Farrar said recently that his lawyer had advised him not to talk about the case.

"I probably shouldn't have said anything the first time," Farrar said.

Evans said in an interview Tuesday that Hawkins' lawyer, Larry Stewart of Miami, persuaded Channel 2 attorney, Al Pitts, to cancel appointments for later this month to take the sworn testimony of Farrar and Gene Hawkins. Both attorneys have refused to comment about the case.

Evans said the station will ask for an early trial date in the suit.

ABLE COPY

TV station disputes Hawkins

ORLANDO — An Orlando television station says it has paid $11,000 in medical bills submitted by U.S. Sen. Paula Hawkins, R-Fla., as a result of a studio accident that injured her neck during a 1982 interview show.

Hawkins has sued WESH-Channel 2 for damages, claiming negligence.

The station, which has admitted she was injured when a studio backdrop fell on her but has denied any negligence, said in documents filed in Circuit Court that her medical bills were paid until she stopped submitting them in 1984.

Hawkins provoked a dispute over the medical claims when she said on *CBS Morning News* that she had to file suit "since the TV station has not paid our bills."

BEST AVAILA

ORLANDO SENTINEL 10-14-86

Hawkins' suit set for Dec. 9

WESH lawyer attacks her request for delay

By Craig Crawford

OF THE SENTINEL STAFF

A trial in U.S. Sen. Paula Hawkins' negligence lawsuit against WESH-Channel 2 is set for mid-December, but the station's lawyer charges that the senator misled the court to avoid a trial before the Nov. 4 election.

Orange Circuit Judge William Gridley settled a standoff between lawyers for both sides by agreeing to a Dec. 9 trial date. Hawkins' lawyers had said in court documents that the senator could not attend an earlier trial because she is still recuperating from neck surgery.

But WESH lawyer Al Pitts said

On the campaign trail: B-1

that claim does not jibe with what Hawkins says on the campaign trail.

"Mrs. Hawkins is trying to eat her cake and have it too," said Pitts in a document opposing a post-election trial date. He could not be reached for comment Monday.

"She is telling the public that she is able to run a re-election campaign and garner contributions and perform her services as a U.S. senator, while at the same time she is saying in this lawsuit that she has sustained a major disability," said Pitts. "Justice requires that Mrs. Hawkins take a public stand one way or another."

Hawkins, a Republican from Winter Park who is seeking her second term, was campaigning Monday in Tampa and had no comment. Her attorney, Larry Stewart of Miami, has refused to discuss the case.

"Nobody with the campaign is involved in the lawsuit and no one can comment," said Hawkins campaign manager Charles Black in Washington, D.C.

Hawkins sued WESH in January, claiming she was permanently injured in 1982 when a prop fell and struck her on the neck at the station's Winter Park studio.

In the suit she said she still feels pain and cannot work as well as she could before the accident. Her husband Gene also filed suit against the station, claiming the loss of his wife's "consortium and companionship." In March the senator called the legal claims "just boilerplate language."

Last April doctors at Duke University Medical Center operated twice on vertebrae in the senator's neck to relieve chronic pain.

The lawsuit has put Hawkins in the position of maintaining that she is healthy enough to be a senator and an active campaigner against Democratic challenger Gov. Bob Graham while arguing in court that her injuries were severe enough to justify the damages she is seeking.

In 1985, WESH rejected Hawkins' demand for a financial settlement and made no counteroffer.

Please see **SUIT, A-7**

BLE COPY

SUIT

From A-1

"Mrs. Hawkins is holding out for big money against the defendant," said Pitts in a court document. "The court should not allow her to have it both ways."

Gridley gave no reason for granting the request last week by Hawkins' attorney that the trial be held in December. Gridley also could not be contacted Monday.

Graham campaign officials had no comment about Pitts' charges, but did point out that Hawkins has been well enough for extensive traveling.

"She managed a grueling three-day tour last week in New York promoting her book," said Graham consultant Robert Squier in Washington, D.C. Hawkins and a ghostwriter recently published a book about child abuse.

Pitts has subpoenaed about 20 doctors and hospital representatives for medical records on "Paula Hawkins aka Paula Mandell." The senator has been using the assumed name for her medical treatment.

The station's insurance carrier, Zurich-American Insurance Companies, paid more than $11,000 in medical expenses to Hawkins until she stopped submitting bills.

Hawkins' history of neck and back problems has complicated efforts to blame her pain solely on the WESH accident.

She underwent surgery in 1960 to fuse a disc in her neck after an automobile accident.

In 1984 she was hospitalized for complaints of severe headaches after an automobile accident in Washington.

MIAMI HERALD 10-15-86

Campaign '86

Notes & Comments

★ ★ ★

Although the senator's day of reckoning comes Nov.4, her day in court has been set for Dec. 9. Arguments that day begin in Hawkins' physical injury lawsuit against an Orlando television station on which she was a guest in 1982 when a prop fell over on her. She claims that because of the mishap, she continues to suffer pain and cannot work to her previous capacity.

Husband Gene Hawkins has filed a separate suit, claiming the loss of his wife's "consortium and companionship."

WESH-TV lawyer Al Pitts said in a brief, however, that her campaign undermines her claims. "She is telling the public that she is able to run a re-election campaign and garner contributions and perform her services as a U.S. senator, while at the same time she is saying in this lawsuit that she has sustained a major disability," Pitts said.

★ ★ ★

Hawkins' surgery delays suit against Channel 2

Hawkins

By Craig Crawford

OF THE SENTINEL STAFF

An Orange Circuit Court judge on Wednesday delayed the trial of former U.S. Sen. Paula Hawkins' lawsuit against WESH-Channel 2 after learning that Hawkins' surgery earlier this week would prevent her from attending the trial.

The trial, which was set for Jan. 22, will be rescheduled for the spring, said Judge William Gridley. He did not set a date.

Gridley responded to requests for delays from attorneys for both Hawkins and WESH.

Hawkins, 59, was recovering Wednesday after four hours of surgery on her lower back at Duke University Medical Center in Durham, N.C. Her husband, Gene, said she is expected to remain hospitalized for eight to 12 days before returning to her home in Winter Park.

The operation Tuesday was Hawkins' third since April to relieve pain she has suffered since a studio backdrop fell on her during a 1982 interview at WESH's Winter Park studio.

Hawkins sued WESH in January 1986, accusing the station of negligence and claiming that she still felt pain and could not work as well as she could before the accident. Gene Hawkins also sued the station, claiming the loss of his wife's "consortium and companionship."

"After seeing news reports of the operation I assumed the delay was necessary," Gridley said Wednesday. "Then I received a call today confirming it."

The delay is the third since the case was first set to be tried in October. Gridley agreed then to move the trial to Dec. 9 at the request of Hawkins' attorney, Larry Stewart. He argued that Hawkins' pain and campaign schedule prevented her from attending a trial before the Nov. 4 Senate election. Former Gov. Bob Graham won the election and was sworn in as a U.S. senator this week.

After Hawkins' defeat, Gridley granted another delay requested by Stewart, this time rescheduling the trial for Jan. 22. Stewart again said in court documents that Hawkins' continuing medical treatment prevented her from attending the trial.

In Tuesday's surgery, doctors removed fragments of a disc that were touching nerves and causing pain. They also took bone from the hip and fused two sets of vertebrae in her back.

STEWART TILGHMAN FOX & BIANCHI, P.A.
ATTORNEYS AT LAW
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SUITE 1900
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(305) 358-6644

February 10, 1988

HAND DELIVERED
Mr. Gerald Cope, Jr.
Greer, Homer, Cope & Bonner, P.A.
4870 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

Re: The Miami Herald Publishing Co. v. Gradley
Case No. 87-1193

Dear Mr. Cope:

In preparing our respondent's brief, we discovered that the United States Supreme Court denied the Miami Herald's petition for certiorari in *Palm Beach Newspapers, Inc. v. Burk* on November 16, 1987. As a result of bringing that to your attention yesterday, you have corrected the citation in your brief.

I have now reviewed the Miami Herald's petition for certiorari in the *Burk* case. It is substantially identical to the petition in this case. In view of the denial of certiorari in *Burk*, before we invest any more time, effort and costs, I respectfully suggest to you that you should withdraw the petition in this case. If the Miami Herald elects to continue with this petition, we will submit to the Court that it is a "frivolous" petition within the meaning of Rule 49.2 of the Supreme Court Rules and seek appropriate damages from the Court.

Very truly yours,

/s/ LARRY S. STEWART
Larry S. Stewart

LSS:jc
cc: Laura Besvinick
Richard Ovelmen

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1193

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W.E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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Rules and Statutes:

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Sup. Ct. R. 49.2 4
Ind. Code §35-37-4-3 2
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Other Authorities:

Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. B. A. Q. 393 (1960) 4
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 4-5
Minutes of Advisory Committee on Rules of Civil Procedure (Feb. 22, 1936) 9

No. 87-1193

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

VS.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W.E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

Petitioner The Miami Herald Publishing Company files this reply to Respondents' Paula Hawkins and W.E. Hawkins Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida.

I.

Hawkins' first and primary contention is that this Court's denial of certiorari in *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla.), *cert. denied*, 108 S.Ct. 346 (1987), mandates the denial of the petition in this case.

According to Hawkins, the issues and the petitions filed in each case are "identical" and thus the denial in the *Burk* case requires the same denial in this case. Moreover, Hawkins asserts, the recent denial of certiorari in *Burk* renders the instant petition so clearly "frivolous" on its face that The Miami Herald should be required to pay Hawkins damages for having filed it.[1]

These claims are without merit. First, the petition in this case and the *Burk* petition are not identical. This case, unlike *Burk*, raises the issue of public access to unfiled *civil* discovery materials. This issue is of nationwide concern because the civil discovery procedure is employed in state and federal courts across the country. Accordingly, there is a particularly urgent need for the Court's guidance on this issue. In contrast, *Burk* raised the issue of public access to unfiled *criminal* deposition transcripts, an issue of more limited interest because few states employ an expansive deposition procedure in criminal cases.[2] The opinion of the Florida Supreme Court below is clearly a significant *extension* of that court's *Burk* holding based on this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), which merits this Court's review.

Second, and contrary to Hawkins' claim, the law governing access to discovery materials has continued to

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1. Counsel for Hawkins includes his letter to counsel for petitioner asking that the petition be withdrawn in his Appendix. He fails, however, to include The Miami Herald's response. That response is included in the Appendix to this reply, consecutively numbered as A43-A45.

2. Although most states follow the liberal federal discovery model in civil cases, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984), only six states employ similarly expansive discovery procedures in criminal cases. *See* Fla.R.Crim.P. 3.220; Ind. Code §35-37-4-3; Iowa R.Crim.P. 12; Mo.R.Crim.P. 25.12; N.D.R.Crim.P. 15; N.H. Rev. Stat. Ann. §517:13.

develop since the *Burk* denial.[3] Brief in Opposition at i. The recent decision of the United States District Court for the District of Columbia in *Avirgan v. Hull*, No. 87-252 (D.D.C. Dec. 9, 1987) (available on LEXIS, Genfed library, Dist file), is illustrative. In *Avirgan*, the court denied the motion for protective order of a deponent in a civil case who sought to prohibit the attendance of the press and public at his deposition. As a preliminary matter, the court rejected the plaintiff's request that "all future depositions" in the case be closed, stating

> As the determination of good cause requires consideration of the circumstances regarding the deposition of the individual defendant, plaintiff's motion is appropriately denied despite the burden it might place on the courts.

Id. at 1, n.1. Relying specifically on this Court's decision in *Seattle Times*, the *Avirgan* court held that the "good cause" standard embodied in the rules of procedure and applied case by case "balances the governmental and first amendment interests at stake when a party seeks to disseminate information obtained through pretrial discovery." *Id.* at 2 (citations omitted). The court defined "good cause" in this context as "specific facts showing 'clearly defined and serious injury' resulting from the discovery sought." *Id.*

In contrast to the *Avirgan* court, the Florida Supreme Court required no showing of good cause for closure and permitted all discovery proceedings to be sealed without a case by case evaluation of the need for closure. *Avirgan*

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3. It should also be noted that there were only eight Justices on the Court when certiorari was denied in *Burk*. As of this writing, there is again a full complement of nine Justices on the Court.

v. Hull is thus clearly in direct conflict with the decision below.

Third, it has long been recognized that a denial of certiorari has no precedential value. As this Court has consistently stated, "[t]he denial of a writ of certiorari imparts no expression upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). "Writs of certiorari are a matter of grace. Matters relevant to the exercise of [the Court's] certiorari jurisdiction frequently result in denials of the writ without any consideration of the merits." *Wade v. Mayo*, 334 U.S. 672, 680 (1948). Indeed, as Justice Brennan once noted:

> A denial of certiorari is not an affirmance of the state court judgment as some erroneously think. It means only that the petition for review did not get four votes and it means absolutely nothing more. The denial does not mean that the Court agrees with the result reached by the state court or with the state court's decision of the federal question. . . . *The Court may well take the very next case raising the same question and reach a different result on the merits.*

Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. B. A. Q. 393, 402-03 (1960) (emphasis added).

Finally, as to the damages sought by Hawkins pursuant to Rule 49.2, Rules of the Supreme Court of the United States, little need be said.[4] The petition is ob-

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4. Rule 49.2, Rules of the Supreme Court of the United States, has been sparingly employed by this Court. It has been estimated that there have been "less than a dozen reported instances where the Court has used what is now Rule 49.2 to assess damages" since 1803 when the precursor to the rule was first adopted. R. Stern, E. Gressman & S. Shapiro, *Supreme*

(Continued on following page)

viously not "frivolous." Rather it addresses a substantial federal question—whether the constitutional right of access extends to unfiled discovery materials in civil cases. As demonstrated both in the petition and in this reply, this question is of great public importance. State and federal appellate courts are in conflict and the issue is ripe for this Court's review and resolution.[5]

II.

On the merits of the petition, Hawkins contends that no case recognizes a First Amendment right of access to unfiled civil discovery materials, and, consequently, that no conflict exists which requires this Court's resolution. Hawkins is in error. In fact, as demonstrated in the petition, Petition at 16-17, some seven circuits have relied on this Court's decision in *Seattle Times* to hold that public access to civil discovery materials may be restricted consistent with the First Amendment only if "good cause" for the restriction is shown.

Hawkins mistakenly argues that the cases cited by The Miami Herald which recognize this limited First

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Footnote continued—

Court Practice 635 (6th ed. 1986). Typically the Court has only awarded such damages where a frivolous petition caused some delay which harmed the respondent. Clearly, the petition is not frivolous nor has Hawkins been caused any delay by the petition. *See* Brief in Opposition at 12.

5. The development of the relevant law in Florida reveals the magnitude of the problem. As a direct result of *Burk*, and the Florida Supreme Court's misinterpretation of *Seattle Times*, public access to depositions has been denied where the deponent favors access, *Post-Newsweek Stations, Florida, Inc. v. State*, 510 So.2d 896 (Fla. 1987), where the criminal defendant favors access, *Palm Beach Newspapers, Inc. v. State*, 506 So.2d 1037 (Fla.), *cert. denied*, 108 S.Ct. 346 (1987) and even where the deponent is the elected state attorney testifying in his official capacity. *Miami Herald Publishing Co. v. Hagler*, 506 So.2d 1037 (Fla.), *cert. denied*, 108 S.Ct. 358 (1987).

Amendment right hold, as does the case at bar, that there is *no* First Amendment right of access to the civil discovery process. Brief in Opposition at 6. The actual holdings of the cases belie Hawkins' claim, however. The language of *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986), relied on by Hawkins for this proposition, is typical:

> *Protective discovery orders are subject to first amendment scrutiny,* but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause.

Id. at 7 (emphasis added).

The cases relied on by The Miami Herald which adopt and apply the "good cause" standard pursuant to *Seattle Times* and the First Amendment are thus *not*, as Hawkins claims, Brief in Opposition at 10, "to the same effect" as those cases, like the case at bar, which flatly hold there is no access right of any kind to civil discovery. To the contrary, this case and the cases cited by Hawkins, Brief in Opposition at 10, are in clear *conflict* with the "good cause" cases. Brief in Opposition at 6.[6]

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6. *Compare Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987) (quoting and applying the *Seattle Times* First Amendment "good cause" analysis to the closure of a deposition but declining to apply the more stringent First Amendment "compelling interest" analysis reserved for trial proceedings); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (recognizing "presumptive right of access to discovery materials" absent "good cause" showing); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) (holding that protective orders are not subject to "heightened" First Amendment scrutiny "if issued upon good cause"); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (holding protective orders "subject to First Amendment scrutiny" within framework of "good cause" analysis); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986), *appeal after remand*, 822 F.2d 335 (3d Cir.), *cert.*

(Continued on following page)

Finally, Hawkins argues that a full First Amendment right of access should not be extended to civil discovery because (1) there is no history of access and (2) access is not essential to the proper functioning of the judicial process. Brief in Opposition at 10. Hawkins is again in error.

As shown in the petition, Petition at 18-22, and below, notwithstanding the dicta in *Seattle Times* and *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979), the civil discovery process in Florida, as elsewhere, has long been open to public scrutiny. The Miami Herald placed before the Florida Supreme Court clear historical evidence of the intent of the drafters of the Federal Rules of Civil Procedure (on which the Florida rules are modeled) gleaned from the notes and records of the drafters and maintained in document repositories around the country.

Footnote continued—

denied, 108 S.Ct. 487 (1987) (remanding for application of *Seattle Times* First Amendment "good cause" analysis to closure of discovery materials rather than more stringent "least restrictive means" analysis); *Worrell Newspapers v. Westhafer*, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984), *aff'd*, 469 U.S. 1200 (1985) (quoting *Seattle Times* First Amendment "good cause" analysis); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for application of *Seattle Times* First Amendment "good cause" analysis); *United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd*, 776 F.2d 1104 (3d Cir. 1985) (adopting and applying *Seattle Times* First Amendment "good cause" analysis to bill of particulars deemed criminal discovery material); *State v. Cianci*, 496 A.2d 139, 144-45 (R.I. 1985) (recognizing a First Amendment right of access to discovery materials produced in a state criminal prosecution) *with Booth Newspapers, Inc. v. Midland Circuit Judge*, 377 N.W. 2d 868 (Mich. Ct.App. 1985), *leave to appeal denied*, 425 Mich. 854 (Mich. 1986), *cert. denied*, 107 S.Ct. 877 (1987) (public has no standing to seek access to unfiled discovery materials); *Lewis R. Pyle Memorial Hospital v. Superior Court*, 149 Ariz. 193, 717 P.2d 872 (1986) (public has no right of access to unfiled discovery materials); *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985) (public has no standing to seek access to unfiled discovery materials).

This evidence demonstrated that the drafters presumed that the public would be permitted access to depositions and that the protective order mechanism was developed to respond to this eventuality.[7]

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7. Public access to the discovery process was explicitly addressed by the committee selected to draft the modern federal rules:

> Mr. Sunderland. The particular difficulty you suggested, Senator, by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.
>
> Mr. Pepper. Our judges would never make a rule like that.
>
> Mr. Morgan. Is not the protection the one Judge Olney spoke of? If the questions are impertinent and do not relate to the merits, if it is the adverse party counsel will tell him not to answer, and then the only way you can determine whether or not he has to answer by an application to the court for an order to compel him to answer. Then the whole thing will be threshed out before the court, and no answer will be given until the court orders him to answer. There the whole thing can be handled that way to protect against abuse. Certainly if I were appearing for an adverse party he would not answer if the questions got out of bounds, until the court told him he had to.
>
> Mr. Pepper. Of course, there is a lot in that. It is all a question of whether the thing is going to work out happily and decently, and in sportsmanlike fashion, the way it evidently does in California, or whether it is going to work out along such lines as I perhaps mistakenly apprehend.
>
> But if it works out the way I venture to apprehend, the publicity is: "Important Question Asked of President of X.Y.Z. Company. Corporation Attorney Instructs Witness Not to Answer."
>
> Where are the liberties of the citizen, and all that? That is what you get in the newspaper the next day, and it is a lot worse than if you answered, because the question might be susceptible of being answered No.

(Continued on following page)

The *Gannett* dicta repeated in *Seattle Times* and relied on by Hawkins, although to the contrary, is not dispositive. "[*S*]*tare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." *Wallace v. Jaffree,* 105 S.Ct. 2479, 2512 (1985) (Rehnquist, J., dissenting). The repetition of the historical error made in *Gannett* "does not make it any sounder historically." *Id.* The historical *evidence* provides the controlling authority on this issue, and that evidence demonstrates that discovery was intended to be and long has been presumptively public, both in the federal courts and in Florida, where the tradition of access dates back to the inception of the discovery rules and was only brought to a close by *Burk* and the decision under review.

There are sound reasons that the discovery process should be open to public view.[8] The discovery process now serves much the same function that trial serves. Indeed, because so few cases now culminate in trial, discovery is typically the only opportunity for the public to scrutinize the process of civil justice, a fact Hawkins does not deny. This case is a good example. As Hawkins notes, her personal injury lawsuit was ultimately settled.

Footnote continued—

> Mr. Dodge. I am not accustomed to having depositions taken in public.
>
> Mr. Pepper. They always are with us.
>
> The Chairman. Is that not a Constitutional requirement?

Minutes of Advisory Committee on Rules of Civil Procedure (Feb. 22, 1936).

8. As Judge Wisdom noted in *Wilk v. American Medical Association,* 635 F.2d 1295, 1299 (7th Cir. 1980):

> [I]n addition to the abstract virtues of sunlight as a disinfectant, access [to pretrial discovery] materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

The litigation ended without ever coming under public scrutiny. The Miami Herald does not seek to "make the courts a tool for information gathering." Brief in Opposition at 11. The fact is that the courts belong to the public and the public has the right to know how the courts are being used and how their elected officials are being treated by the courts. That right should not depend on a litigant's individual decision to file the information he learns through court-sanctioned discovery.

CONCLUSION

Petitioner The Miami Herald Publishing Company respectfully requests that the Petition for Writ of Certiorari be granted and Hawkins' request for damages be denied.

Respectfully submitted,

GERALD B. COPE, JR.
(Counsel of Record)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Reply Brief was served March 10, 1988, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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I further certify that all parties required to be served have been served.

GERALD B. COPE, JR.

APPENDIX

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Laura Besvinick

February 10, 1988

HAND DELIVERED

Larry S. Stewart, Esquire
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Suite 1900
44 West Flagler Street
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RE: The Miami Herald Publishing Co.
v. Gridley Case No. 87-1193

Dear Mr. Stewart:

We are in receipt of your letter of this date. The Miami Herald will not withdraw the petition. There are several reasons.

First, you should note that since 1803 when the precursor to Rule 49.2 was adopted, there have probably been "less than a dozen reported instances where the Court has used what is now Rule 49.2 to assess damages." Stern, Gressman & Shapiro, *Supreme Court Practice* 635

(6th Ed. 1986). Further, the Court has only awarded damages where frivolous petitions have harmed the respondent because of the resulting delay. *See, e.g., Deming v. Carlisle Packing Co.*, 226 U.S. 102, 110 (1912). Certainly, this petition has caused your client no harm or delay.

Second, the petition is not "frivolous." A "frivolous" petition is one which does not address a substantial federal question. The question addressed in this petition—the scope of the constitutional right of access and its application to unfiled discovery materials in civil cases—is of great public importance. State and federal appellate courts are in conflict on the issue and we believe the issue is ripe for United States Supreme Court review.

Third, your assumption that the petition filed by The Miami Herald in this case is identical to the one filed in *Palm Beach Newspapers, Inc. v. Burk* is simply incorrect. *Burk* was a criminal case and the only issue presented was whether the constitutional right of access extended to unfiled deposition transcripts in criminal cases. This is a civil case and the issue presented, although related, differs significantly from the issue briefed in *Burk*. Further, this case raises the additional question of whether the constitutional right of access extends to *civil* proceedings. As noted in the petition, the United States Supreme Court has not yet explicitly held that the access right extends to civil proceedings.

Finally, a denial of certiorari is not a decision on the merits of the petition. *E.g., United States v. Carver*, 260 U.S. 482, 490 (1923); *accord Wade v. Mayo*, 334 U.S. 672, 680 (1948). The Court did not state its reason for denying the petition in *Burk*. Accordingly, you cannot

assume that the Court would deny the petition in this case simply because it denied the petition in *Burk*. Similarly, the fact that The Miami Herald made certain arguments in the *Burk* petition does not bar it from making those arguments in this case nor does the Court's denial of certiorari mean that those arguments are "frivolous."

For these reasons and many more, The Miami Herald will not withdraw the petition.

Very truly yours,

/s/ Laura Besvinick
Laura Besvinick

LB/jl

cc: Richard J. Ovelmen, Esq.
Gerald B. Cope, Jr., Esq.